INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Statutes and executive order involved	2
Statement	2
Argument	11
Conclusion	15
Appendix	16

CITATIONS

Statutes:	
Defense Production Act of 1950 (50 U.S.C. App. (1952 ed.) 2061 *et seq*)	6, 7, 14, 17
Section 2092	17
Section 2093	6, 17
Strategic and Critical Materials Stock Piling Act of 1946 (50 U.S.C. (1952 ed.) 98)	3, 4, 6, 7, 12, 13, 16
Section 98a	16
Section 98b	16
Miscellaneous:	
Executive Order No. 10281 (16 F.R. 8789):	
Section 303	6, 17
Section 304	6, 18
Section 305	6, 18
1 Williston, *Contracts* (3d ed., 1957), § 37	12

639286—62——1

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 856

WILLEMS INDUSTRIES, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. 22) is reported at 295 F. 2d 822.

JURISDICTION

The judgment of the Court of Claims was entered on November 1, 1961, and petitions for rehearing were denied on January 12, 1962. The petition for a writ of certiorari was filed on April 10, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

1. Whether the negotiations between Emergency Procurement Service (EPS) and petitioner resulted

in a contract binding EPS to give financial assistance to petitioner.

2. Whether the requirement of the Defense Materials Procurement Agency (DMPA) that the EPS procurement contract be cancelled and another contract be entered into with DMPA as a condition precedent to the granting of a loan effected an anticipatory breach of the EPS contract, excusing petitioner from performance and entitling it to damages.

3. Whether EPS committed a breach of contract by its failure to renew a letter of credit for the benefit of petitioner, when the contract obligated it to maintain the letter of credit only as a medium for partial payment for shipments of ore actually made pursuant to the contract and petitioner contemplated no delivery during the period allowed in the contract, but instead requested amendment of the contract to extend the original shipment date.

STATUTES AND EXECUTIVE ORDER INVOLVED

The pertinent provisions of the Strategic and Critical Materials Stock Piling Act of 1946 (50 U.S.C. (1952 ed.) 98), the Defense Production Act of 1950 (50 U.S.C. App. (1952 ed.) 2061 *et seq.*), and Executive Order No. 10281 (16 F.R. 8789) are set forth in the Appendix, *infra*, pp. 16–18.

STATEMENT

The facts as found by the Court of Claims are as follows:

On September 1, 1950, Jess Larson, the Administrator of the General Services Administration (hereinafter called GSA), established within GSA a special branch designated as the Emergency Procurement

COPY BOUND CLOSE IN CENTER

Service (hereinafter called EPS), and delegated to it the authority he had received from the Munitions Board to purchase, store, and dispose of strategic and critical materials pursuant to the Strategic and Critical Materials Stock Piling Act of 1946 (Finding 2).

After ascertaining that columbite ore was in short supply and being purchased for the national stockpile, Edward J. Willems, president of the petitioner corporation, in a letter dated March 13, 1951, offered to sell to EPS approximately two million pounds of the ore from sources in British Guiana (Findings 5, 6). On March 29, 1951, a revised proposal was submitted in which petitioner stated that it was unable to furnish a fixed delivery schedule, but that shipments would start within six months after the contract was awarded and that, as development of the supplies progressed, petitioner would furnish to EPS quarterly delivery schedules, working under a five-year program to deliver a total of about two million pounds of the ore. In addition to such matters as price, the quality of the ore, and a statement to the effect that the primitive conditions at the source of the ore would require considerable effort and expense for development, the revised offer contained the following paragraph (Finding 7):

> Having the assurance and with the help of the United States Government, we are prepared to speed up, and step up, production as rapidly as conditions will permit, by installing whatever feasible equipment may be deemed necessary to achieve the most satisfactory end results.

On April 13, 1951, petitioner's revised proposal was accepted by EPS in a telegram from H. C. Maull, Jr. The acceptance differed from the offer in several material respects, and did not mention any government assistance (Finding 7). On August 1, 1951, Willems wrote to Captain Maull of EPS informing him that the EPS acceptance deviated from the offer in several respects, and in particular, as follows (Finding 13):

> (d) Our offer states clearly quote *"Having the assurance and with the help of the United States Government."* Your instrument neither gives assurance nor offers help.

Shortly thereafter, on August 3, 1951, Willems and a Mr. Wolfson, the secretary of petitioner corporation, conferred with EPS officials in Washington and complained of the inconsistency between the offer and acceptance. Following the conference, the parties entered into a detailed written contract, defining the full scope of their respective obligations and rights in connection with the transaction. The contract stated that the materials to be supplied thereunder were to be procured pursuant to the Strategic and Critical Materials Stock Piling Act of 1946 and that the material was to be mined and exported from British Guiana, South America (Finding 10). Prior to the signing of the contract, there was no discussion indicating that EPS would extend financial assistance to petitioner. Captain Maull and the other representatives of EPS with whom petitioner negotiated informed petitioner that the authority of EPS was limited under the Strategic and Critical Materials

COPY BOUND CLOSE IN CENTER

Stock Piling Act of 1946 to the purchase and procurement of materials for the national stockpile and that EPS had no authority to grant loans or to extend financial assistance to EPS contractors. At the same time, Captain Maull informed Messrs. Willems and Wolfson that the Export-Import Bank and the Economic Cooperation Administration were agencies of the government which had authority to make loans or grant financial assistance to persons or concerns who had contracted to furnish material for the national stockpile (Finding 13).[1]

On August 8, 1951, petitioner requested EPS to establish a letter of credit in the amount of $100,000. On August 3, 1951, a letter of credit conforming to the provisions of the contract was established. The letter provided for sight drafts to be drawn on the National City Bank of New York for 75 percent of the invoiced amount of shipments meeting specified standards. By telegram of September 20, 1951, petitioner acknowledged that the provisions of the letter of credit were satisfactory (Finding 11).

[1] Petitioner's awareness of the limited authority of EPS is indicated by the fact that, before the contract was signed, petitioner sought financial assistance from these other agencies (Finding 13). Thus, from July 1951 on, petitioner was in communication with the Economic Cooperation Administration (ECA) regarding a loan application for aid in securing equipment necessary for the development of the area in which the columbite ore was to be mined. However, despite communication with several ECA officials, as of September 11, 1951, no loan commitment had been made, although ECA was investigating the project and considering the application. Prior to this time, petitioner had also applied for a loan at the Export-Import Bank (Pet. 24–25).

On September 9, 1950, the President delegated to the Secretary of the Interior the authority contained in the Defense Production Act of 1950, with respect to the exploration, development, and mining of strategic and critical metals and materials. The Secretary created within the Department of the Interior a Defense Minerals Administration to which he delegated the authority received from the President. Thereupon, the Defense Minerals Administration asked GSA to serve as the contracting agency in procurement, and GSA assigned the work to EPS. As a result of this action, EPS was, during the remainder of 1950, responsible for contracting for the procurement of strategic and critical materials, subject to policy determinations by the Munitions Board under the Stock Piling Act of 1946 (see *supra,* pp. 2–3), or by the Defense Minerals Administration under the Defense Production Act of 1950 (Finding 20).

On August 28, 1951, by Executive Order No. 10281 (16 Fed. Reg. 8789), the President created the Defense Materials Procurement Agency (hereinafter referred to as the DMPA) which was authorized to encourage exploration, development, and mining of critical and strategic materials and to purchase metals and minerals and other materials for government use or resale subject to the provisions of Section 303 of the Defense Production Act of 1950, as amended (50 U.S.C. App. (1952 ed.) 2093) (Finding 21). When the DMPA was created, Jess Larson, who had theretofore been Administrator of GSA, was also named Administrator of DMPA. As a result of the actions described above, the responsibility for procurement contracting, as well

as the responsibility for the determination of policies affecting procurement under the Defense Production Act of 1950, was transferred to the DMPA. EPS was relieved of any responsibility it had for procurement under the Defense Production Act of 1950, but retained its procurement responsibility under the Stock Piling Act of 1946 (Findings 22–23).

After learning of the transfer of certain EPS functions to DMPA, on December 11, 1951, Willems mailed an application for a loan of $153,720 for exploration of 12,000 acres of land in British Guiana to DMPA (Finding 24). On December 12, 1951, the Director of the Foreign Expansion Division replied to Willem's letter advising him, *inter alia,* that the quality of engineering supervision and management to be employed on the project would strongly affect DMPA's decisions on the loan application and requesting further information (*ibid.*).

Later in December, Willems met with Philip McKenna, president of Kennametal, Inc., a firm with considerable mining and metals experience, which had utilized columbite in its manufacturing operations and which was interested in joining with petitioner in the columbite venture in British Guiana. On January 14 and 15, 1952, meetings were held between representatives of Kennametal, petitioner, and DMPA concerning the loan application. Terms were discussed and DMPA suggested that Kennametal and petitioner submit a new and complete application. The applicants were advised that prior to any action on a contract, it would be necessary to obtain the

approval of the Division Director, and to submit it to the Deputy Administrator, and finally Jess Larson, the Administrator, for his signature and approval (Findings 25–29).

The completed loan application was submitted on January 16, 1952. As set out in the application the loan was to be in the form of an advance against production. In a letter dated January 23, 1952, DMPA advised petitioner that the application had "been approved in principle" and that "[a]rrangements [had] been made for a conference * * * to work out the details of a contract" (Finding 31).

On February 15, 1952, in response to a letter from a Kennametal official, DMPA noted that preparation of legal documents was not the sole impediment to the granting of the loan. In addition, it objected to the EPS contract and demanded its cancellation by petitioner as a condition precedent to the granting of a loan on the grounds that petitioner would be unable to meet the obligations as to price and delivery in its contract with EPS and that DMPA wished to procure the columbite itself. Petitioner was also advised that execution of a contract was a condition precedent to the earmarking of government funds for the project (Pet. 26–27).

On March 7, 1952, Willems and a Kennametal representative conferred with Mr. Regan, a DMPA attorney, to analyze the proposed contract. They suggested numerous amendments and deletions to Regan who informed them that he lacked authority to agree to the suggested changes (Finding 36). On April 2, 1952, DMPA informed Kennametal that Wil-

lems was unacceptable to it as head of the project. On April 15, 1952, a final conference ensued between the parties at which time sharp disagreement arose between Willems and DMPA regarding, *inter alia,* the cancellation of petitioner's EPS contract and Willems' management of the project. Shortly thereafter, Kennametal withdrew from negotiations with petitioner. Upon learning of this, DMPA treated the negotiations regarding the loan as terminated (Findings 43–45).

By letters dated January 10, and April 7, 1952, the contracting officer of EPS asked petitioner to supply statements showing the quantities of ore to be delivered during the first quarter of 1952 as required by the EPS contract. On April 17, 1952, petitioner replied by mail requesting extension of the original letter of credit. On May 29, 1952, petitioner sent a further letter to EPS requesting amendment of the contract to extend the original shipment date to the end of 1952. The contracting officer, in reply to petitioner's requests, asked that petitioner clarify the discrepancies apparent in the previous communications regarding the dates of shipments. The contracting officer further asked petitioner to advise him concerning the necessity for extending the letter of credit through the latter half of 1952, when petitioner contemplated no deliveries during that period (Finding 50).

On February 5, 1953, EPS advised petitioner by registered letter that unless deliveries commenced prior to February 15, 1953, petitioner's right to proceed under the contract would be terminated. On

February 17, 1953, the contracting officer notified petitioner that inasmuch as no deliveries had been tendered under the contract, EPS was terminating petitioner's right to proceed, pursuant to special article 15, without prejudice to any rights the government might have in consequence of petitioner's breach of contract (Findings 50, 57).

Thereafter, petitioner brought this suit in the Court of Claims to recover damages for losses alleged to have been sustained as a result of the government's breach of contract. The government counterclaimed for damages based on petitioner's nonperformance under the EPS contract.

The Court of Claims held (Pet. 29–33) that the statement in petitioner's offer "having the assurance and with the help of the United States" did not support the inference that EPS legally obligated itself regarding financial assistance to petitioner in the absence of any expression by government officials of such an intention. The court also held that EPS and DMPA were not identical for the purposes of the transaction, and that DMPA's actions did not constitute the actions of a party to the EPS contract. Consequently, it found that the DMPA demand for cancellation of the EPS contract as a condition precedent to the granting of the loan did not precipitate an anticipatory breach of the EPS contract by the government. Finally, the court observed that petitioner's contention that EPS committed a breach by failure to renew the letter of credit was without merit since the contract obligated the government to maintain the letter

of credit only as a medium for partial payment to petitioner for shipments of ore actually made pursuant to the contract and petitioner did not make any shipments during the period allowed in the contract.[2]

ARGUMENT

Petitioner's contentions all depend on the particular circumstances of this case. Since petitioner raises no issue of general importance, there is no occasion for review by this Court.

1. Petitioner's revised proposal to EPS, when it was first seeking to obtain the contract to furnish columbite ore, stated that "[h]aving the assurance and with the help of the United States Government, we are prepared to speed up, and step up, production * * *." EPS's acceptance of this proposal, however, did not mention any governmental assistance. Consequently, on August 1, 1951, petitioner wrote EPS:

> (d) Our offer states clearly quote "Having the assurance and with the help of the United States Government." Your instrument neither gives assurance nor offers help.

Nonetheless, EPS and petitioner signed a contract in which no assistance by the government was specified. Petitioner initially contends that a commitment

[2]The Court of Claims, while noting that cancellation by EPS was entirely justified under the clause of the contract that accords the government the absolute right to terminate if petitioner had made no deliveries by February 15, 1953, dismissed the United States' counterclaim on the ground that it had failed to establish any loss suffered by the government as a result of petitioner's breach (Pet. 33–34, 40).

to advance government loans is inferable from the negotiations and contract with EPS. More specifically, petitioner argues (Pet. 12–13) that "the Government [having gone] forward on the basis of the fixed delivery schedule in the face of [petitioner's] letter of August 1, 1951, * * * thereby undertook to loan money or send [petitioner] the mechanized equipment needed to get out the ores in the quantities and time the Government required the same."

There is no reason for this Court to scrutinize the Court of Claims' findings that the contract between petitioner and EPS did not provide for the procurement of a loan for petitioner. In any event, these findings are clearly correct. First, it is a well-established principle of contract law that an offer, to form the basis of a binding agreement, must be sufficiently definite to enable a court to construe it with precision for purposes of enforcement. 1 Williston, *Contracts* (3rd ed., 1957), § 37. Not only is the statement upon which petitioner relies indefinite as to the amount of the loan allegedly sought, it is ambiguous as to the type of assistance desired. Second, neither the offer and acceptance, nor the August 3, 1951, contract obligated EPS to secure financial assistance for petitioner. And finally, on August 3, 1951, the date the contract was signed, EPS officials informed petitioner that they were acting pursuant to the Strategic and Critical Materials Stock Piling Act of 1946, which conferred no authority to extend financial assistance. Thus, petitioner was duly apprised of the intention of the

EPS officials not to incur any obligation to secure a loan for petitioner.

2. Petitioner also argues (Pet. 13–15) that the demand by DMPA that petitioner cancel its contract with EPS as a condition precedent to the granting of a loan was an anticipatory breach of contract excusing petitioner from performance of the contract. The contention is that EPS and DMPA, as organs of GSA, "were required by law to cooperate together for purpose of carrying out the purposes and objects of [petitioner's] EPS contract," and thus DMPA's actions constitute the actions of a party to the EPS contract.

This claim is without merit for two reasons. First, there is no finding, and no evidence in the record, that there was an intention on the part of the government to repudiate the EPS contract. The mere request by DMPA that petitioner cancel its contract with EPS certainly does not show that the government did not intend to fulfill its obligation under the contract. Second, the Court of Claims was clearly correct in deciding that the two agencies were not identical for purposes of the transaction, and that therefore DMPA's actions did not constitute the actions of a party to the EPS contract. The EPS contract stated on its face that EPS was acting in a procurement capacity under the authority of the Strategic and Critical Materials Stock Piling Act of 1946 (see ~~supra~~ infra, p. 14). Thus, presumably it would best serve the legislative purpose by purchasing the ore at the lowest price obtainable under market conditions. DMPA, on the other hand, was concerned, pursuant to its authority

under the Defense Production Act of 1950 (see *infra*, p. 17), with a broader program of encouraging development of strategic materials in short supply, as well as with procurement. Thus, it might have decided to pay higher prices for the ore than those specified in the EPS contract in order to encourage the development of sources for columbite ore. Even though the two agencies were both in GSA, they were not "fingers of the same hand," as petitioner contends, but were in fact separate entities, acting pursuant to different legislation and pursuing objectives which were not necessarily identical or reciprocal.

3. Finally, petitioner claims (Pet. 20) that EPS committed a breach of contract by its failure to renew the letter of credit for petitioner, that maintenance of the letter of credit was a condition precedent to petitioner's performance, and that this action of EPS prevented petitioner's performance. The contract between petitioner and EPS, however, obligated EPS to maintain the letter of credit only as a medium for partial payment for shipments of ore actually made pursuant to the contract. The letter of credit therefore provided for sight drafts to be drawn by petitioner as partial payment on invoiced amounts of shipments of ore meeting specified standards. Petitioner never developed the lands on which it held mineral concessions sufficiently to achieve commercial production and never approached the position where it could deliver quantities as specified in the contract. Consequently, petitioner never even contemplated deliveries during the contract period and had, in fact, requested amendment of

the contract to extend the original shipment date to the end of 1952. Thus, EPS did not breach the contract by refusing to renew the letter of credit, and, as the Court of Claims observed, "failure of EPS to renew the letter of credit had no effect whatever on [petitioner's] ability to discharge its contractual obligations" (Pet. 33).[3]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
WILLIAM H. ORRICK, JR.,
Assistant Attorney General.
JOHN G. LAUGHLIN, JR.,
HARVEY M. GOLDBERG,
Attorneys.

MAY 1962.

[3] Petitioner's assertion (Pet. 20) that "it was subsequently agreed upon * * * that [the letter of credit] could be used * * * for any legitimate purpose—to expedite its production; to trade for columbite with other entrepreneurs; to pay subcontractors," etc. is unsupported by the evidence.

APPENDIX

Strategic and Critical Materials Stock Piling Act of 1946 (50 U.S.C. (1952 ed.) 98) provides in pertinent part: sec 98a

(a) To effectuate the policy set forth in section 98 of this title the Secretary of the Army, the Secretary of the Navy, and the Secretary of the Interior, acting jointly through the agency of the Munitions Board, are authorized and directed to determine, from time to time, which materials are strategic and critical under the provisions of sections 98–98h of this title and to determine, from time to time, the quality and quantities of such materials which shall be stock piled under the provisions of said sections. In determining the materials which are strategic and critical and the quality and quantities of same to be acquired the Secretaries of State, Treasury, Agriculture, and Commerce shall each designate representatives to cooperate with the Secretary of the Army, the Secretary of the Navy, and the Secretary of the Interior in carrying out the provisions of said sections.

* * * * *

Section 98b.

The Secretary of the Army and the Secretary of the Navy shall direct the Administrator of General Services to—

(a) make purchases of strategic and critical materials with due regard to the objectives set forth in section 98 of this title and pursuant to the determinations as provided in section 98a of this title, which purchases (1) shall be made, so far as is practicable, from supplies

of materials in excess of the current industrial demand and (2) shall be made in accordance with sections 10a–10c of Title 41, but may be made without regard to section 5 of Title 41. * * *

* * * * *

The Defense Production Act of 1950 (50 U.S.C. App. (1952 ed.) 2061 *et seq.*) provides in pertinent part:

Section 2092:

To expedite production and deliveries or services to aid in carrying out Government contracts for the procurement of materials or the performance of services for the national defense, the President may make provision for loans (including participations in, or guarantees of, loans) to private business enterprises (including research corporations not organized for profit) for the expansion of capacity, the development of technological processes, or the production of essential materials, including the exploration, development, and mining of strategic and critical metals and minerals. Such loans may be made without regard to the limitations of existing law and on such terms and conditions as the President deems necessary, except that financial assistance may be extended only to the extent that it is not otherwis available on reasonable terms * * *.

Section 2093:

(a) To assist in carrying out the objectives of this Act [sections 2061–2166 of this Appendix], the President may make provision (1) for purchases of or commitments to purchase metals, minerals, and other materials, for Government use or resale; and (2) for the encouragement of exploration, development, and mining of critical and strategic minerals and metals: * * *.

* * * * *

Executive Order No. 10281, August 28, 1951 (16 F.R. 8789) provides in pertinent part:

SEC. 303. The Defense Materials Procurement Administrator is hereby authorized and directed to purchase and make commitments to purchase metals, minerals, and other materials, for Government use or resale, as authorized by and subject to the provisions of section 303 of the Defense Production Act of 1950, as amended: *Provided,* That the Secretary of Agriculture is also authorized to exercise the said functions under section 303 of the said Act, as amended, with respect to food.

SEC. 304. The Defense Materials Procurement Administrator is hereby authorized and directed to encourage the exploration, development, and mining of critical and strategic minerals and metals, as authorized by and subject to the provisions of section 303 of the Defense Production Act of 1950, as amended.

SEC. 305. The Defense Materials Procurement Administrator is hereby authorized and directed to make subsidy payments, to determine the amounts, manner, terms, and conditions thereof, and to make findings, as authorized by and subject to the provisions of section 303(c) of the Defense Production Act of 1950, as amended.

U.S. GOVERNMENT PRINTING OFFICE: 1951